

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
No. [REDACTED]

COMMONWEALTH

v.
[REDACTED]

THIRD MOTION FOR DISCOVERY

pursuant to Mass. R. Crim. P. 14 and 23, the defendant asks this Court to order the Commonwealth to produce the following discovery:

FIELD TEST INFORMATION:

On April 10, 2012, Judge Ball ordered the Commonwealth to produce the field test and all inserts to defense counsel on April 17, 2012. On April 17, 2012, Officer Kevin McElmoyle produced a “pouch test” and later emailed ADA Cordeiro the instructions that were forwarded to counsel. Counsel later realized that Detective Keenan did not use a pouch test but a swipe test.

1. The exact brand name and manufacturer of the “narco swipes” field test used by Sgt. Det. Keenan. Keenan describes the test as similar to “wipes you clean your hands with, same exact thing, except on the outside of it says narco swipe.”
2. Instructions, user’s manuals, packaging or other informational documentation from the manufacturer box or inserts in the custody of the Commonwealth or Boston Police.
3. Any training materials used by Boston Police regarding field drug tests.
4. Any Boston Police internal memoranda, letters, rules/regulations, or notices regarding the use of field drug tests.

PROTOCOL BREACH/DOUKHAN ISSUES

Annie Dookhan, the chemist who tested the drugs (previously field-tested by Det. Keenan with a non-drug result) has been fired and removed for serious breach of protocol and subsequent cover-up issues. She is no longer available to testify at trial.

5. A copy of any and all protocols, standards, guidelines, directives and/or policies (“Lab Policies and Procedures”) that are recommended, required, offered and/or available to the chemists, assistants and laboratory workers at the State Laboratory Institute, particularly with respect to protocol procedures recommended, required, offered and/or available to chemists Annie Dookhan and Kate Corbett.

6. With respect to the Department of Public Health Investigation for a possible breach of protocol (the analyst, Annie Dookhan, who has been fired for egregious breach of protocols and who also performed the analysis in this case):
 - a. When was the breach first discovered?
 - b. How was the breach discovered? Was it a self-disclosure, audit or some other method?
 - c. How many cases were affected?
 - d. If the breach of protocol involved chain of custody, what information is there, if any, to support that the correct drugs were tested?
 - e. If protocol requires that a second analyst always work on a particular test, did the second analyst here Kate Corbett, physically see Dookhan test the drugs at issue in this case?
 - f. What are the case names and docket numbers of the cases currently under review.
 - g. Who from the Commonwealth is available to testify as to the Dookhan breach of protocol, cover-up, investigation and ultimate removal.
7. Counsel believes that Dookhan was removed of all responsibilities as of June 2011. Mr. Banks' case was indicted and arraigned on March 24, 2011. Counsel advised ADA Cordeiro of the Dookhan issues via email on April 26, 2012 at which time Ms. Cordeiro advised counsel that she was aware of the problem and working on having the drugs re-rested.
 - a. When was the District Attorney's Office notified of the Dookhan breach of protocol, firing and her unavailability at trial?
 - b. Upon notice of the Dookhan issues and her unavailability, did the District Attorney's Office have a policy or protocol with regard to notifying defense counsel in cases where Dookhan had been the chemist?

PHYSICAL EVIDENCE/CHAIN OF CUSTODY INFORMATION

8. The names, addresses, and positions of every person who had or has had custody of the alleged drugs in this matter;
9. The current location of the Boston Police Department buy money related to this case;
10. The names, addresses, and positions of every person who had custody of the buy money involved in this case on December 13, 2010, and the names and addresses of every person who has had custody of the buy money since that date;
11. Copies of any and all documents related to the "recording" of buy money in this case and the confirmation/seizure of buy money.

12. All “chain-of-custody” evidence/information regarding the physical evidence in this case, including the alleged drugs,¹ alleged dangerous weapon, and buy money:

- a. Documents in the custody or possession of the Boston Police Department which inventory all physical evidence and when all items were logged into the Boston Police Station or Boston Police custody, if ever.
- b. Documents in the custody or possession of the Commonwealth or its agents, including the Boston Police Department, which indicate when any of the items described above were logged in or logged out of the Boston Police Department and any documents which indicate when and to where such evidence was transported and who transported those items.
- c. The names and business addresses of all the police officers or other agents who have handled the evidence in this case or signed the evidence in or out since the evidence was seized.
- d. Any and all internal chain of custody reports governing any and all physical evidence seized in this case.

As grounds, the defendant states the following:

1. The requested evidence is required under Mass.R.Crim.P 14 and 23.
2. The requested evidence may be exculpatory and is necessary to protect the defendant's state and federal constitutional rights, provide effective assistance of counsel, and to adequately prepare for all pretrial hearings and trial.
3. This information may be material and relevant to the Defendant's defense to the charges. Commonwealth v. Hogg, 365 Mass. 290, 294 (1974); Commonwealth v. Bowden, 379 Mass. 472, 485-86 (1980).
4. Weaknesses in the chain of custody have a definite bearing on the overall weight of evidence admitted. Commonwealth v. Colon, 33 Mass. App. Ct. 304 (1992), as does the adequacy of safeguards used to protect and secure evidence as it moves from one place or one person to another. United States v. Ladd, 885 F2d. 954 (1st Cir. 1989).
5. The information requested is essential to afford Mr. banks the opportunity to prepare his defense and to confront the evidence against him, specifically the testimony of the chemist who conducted the drug analysis in this case. See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009). This information is also necessary to provide effective assistance of counsel at trial pursuant to the United States Constitution and Articles XI and XII of the Massachusetts Declaration of Rights.

¹ This request includes all chain of custody for the first Dookhan testing as well as the subsequent testing requested by the Commonwealth.

Respectfully submitted,
JEFFREY BANKS

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